

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.06.2007

CORAM :

THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN

A.S.No.905 of 1991

Marudakutti

.... Appellant/Defendant

Vs.

1. K.Arumugham (Died)
2. Chockkalingam (Died)
3. K.Nallavaradan (Died)
4. N.Subramaniam
5. Solathal
6. A.Balasubramanian
7. Jayalakshmi
8. A.Rangasamy
9. A.Nataraj
10. A.Kanagaraj
11. N.Kamalam
12. N.Balasubramanian
13. N.Vijayakumar
14. Vasuki

..... Respondents/Plaintiffs

(RR5, 6, 7, 8, 9 10 brought on record as LRs of the deceased first respondent, vide order of Court dated 05.06.2007 made in C.M.P.Nos 9281 to 9286 of 2006)

(RR7 brought on recorded as LR of the deceased second respondent, vide order of Court dated 05.06.2007 made in C.M.P.Nos 9281 to 9286 of 2006)

(RR11 to RR14 brought on record as LRs of the deceased third respondent, vide order of Court dated 05.06.2007 made in C.M.P.Nos.9281 to 9286 of 2006)

Appeal filed against the Decree and Judgment, dated 13.08.1991, made in O.S.No.472 of 1986 on the file of the III Additional Sub Court, Coimbatore.

For Appellant : Mr.A.Sheik Peer

For Respondents : Mr.T.M.Hariharan for R4, R11 to R14

J U D G M E N T

The defendant is the appellant. The suit is for specific performance of the agreement, dated 18.06.1985, under which two acres of land were agreed to be sold for Rs.1,04,000/-, each, total sale consideration being Rs.2,08,000/-. Rs.50,000/- was paid in advance. 10 months time was fixed for performance. Under the agreement the defendant should survey the property, plant the stones and also obtain encumbrance certificate for a period of 30 years. 10 months period expired on 18.04.1986. Ex.A.3, endorsement was made on 21.04.1986, extending the period for performance to 20.07.1986. In the meantime, on 28.04.1986, two sale deeds were executed by the defendant in favour of the respondents, Ex.A4 and Ex.A.5, under which one acre in aggregate was sold to the plaintiffs. Thereafter, under Ex.A.6, notice, the plaintiffs called upon the defendant to perform his part of the agreement and execute the sale deed in respect of the remaining one acre. To this, a reply was sent on 12.07.1986, under Ex.A.7, stating that the amount specified under Ex.A.6 does not represent the actual amount to be paid and that out of the advance of Rs.50,000/- and on 18.06.1985, the date of Ex.A.1, Rs.25,000/- was adjusted in the sale consideration for Ex.A.4 and Ex.A.5 and therefore, only Rs.25,000/- remained as advance with the defendant and on that basis, the balance sale consideration must be paid. Thereafter, the suit was filed immediately by the plaintiff, expressing his readiness and willingness and specifically stating in paragraph 8 that entire consideration has been paid for the two sale deeds, Ex.A.4 and Ex.A.5 " but without adjusting the advance of Rs.50,000/- given to the defendant on 18.06.1985."

2. The defendant in their written statement had specifically stated that the plaintiffs were not having sufficient funds to purchase the entire two acres and therefore, they wanted sale deeds to be executed for one acre, for which they also adjusted a sum of Rs.25,000/-, from out of the amount paid as advance, under agreement, dated 18.06.985 and therefore, after calculating the amount paid and the amount adjusted, the defendant said that what is due from the plaintiffs towards the sale consideration is Rs.1,08,000/- and not Rs.54,000/-, as claimed by the plaintiffs. The written statement also specifically alleged suppression of material facts and therefore, claimed that the plaintiffs were not entitled to specific performance of the contract.

3. Before the trial court, third plaintiff was examined as P.W.1 and 7 documents were marked. The defendant examined himself as D.W.1 and no document was marked on his side. The trial court gave a specific finding that the plaintiffs have come to Court with a false case of non adjustment of Rs.25,000/- from out of the advance money paid under Ex.A.1, while obtaining the sale deeds, Ex.A.4 and Ex.A.5. but, however, held that the plaintiffs have proved readiness and willingness and therefore, entitled to specific performance.

4. The learned counsel for the appellant submitted that Ex.A.3, endorsement itself would show that the plaintiffs were not ready and willing at all times and they are bound to plead as proved, because the words used in Ex.A.3, போதிய வசதியும் செலகரியமும் இல்லாத காரணத்தினால் and that this would itself dis-entitle the plaintiffs for getting the specific performance. The learned counsel also submitted that in spite of the specific statement made in Ex.A.7 that Rs.25,000/- was adjusted from out of the advance, while executing Ex.A.4 and Ex.A.5, the plaintiffs had not chosen to prove that the entire sale consideration for Ex.A.4 and Ex.A.5 have been paid by the plaintiffs to the defendant and that no amount was adjusted in the advance. The learned counsel relied on Aniglase Yohannan vs. Ramlatha (2005 (5) CTC 800) and A.Ulaganatha Reddy vs. D.Nandagoppal Chetti (2005 (4) CTC 426).

5. The learned counsel for the respondents, on the other hand would submit that the court below was satisfied with the readiness and willingness. While it is true that there was an adverse finding against the respondent, the adverse finding was not based on the materials on the record and therefore, that the finding is erroneous. The learned counsel, then read out the recitals in Ex.A.4 and Ex.A.5, which is to the effect "18.06.1985ம் தேதியில் எழுதிக் கொடுத்த கிரைய ஒப்பந்தப்படி நாங்கள் தங்களிடமிருந்து கீழ்காணும் சாட்சிகள் முன்படி ரொக்கமாக ஏற்கனவே பெற்றுக் கொண்டது Rs. 10,875/- (Ex.A.4) and Rs.14,125/- (Ex.A.5). The learned counsel submitted that the witnesses in Ex.A.4 and Ex.A.5 are totally different from the witnesses in Ex.A.1. Therefore, when the recitals in the document clearly show that these amounts were paid before the persons, who had signed as witnesses in Ex.A.4 and Ex.A.5, who are not witnesses in Ex.A.1, then the only conclusion that can be drawn from them is that the amount of Rs.50,000/- that was paid before the witnesses in Ex.A.1 was not adjusted by the plaintiffs, but on the other hand, without adjusting that, they had given entire consideration for Ex.A.4 and Ex.A.5 separately.

6. The learned counsel submitted that when the recitals are clear, there was no basis for the court below to come to the conclusion that the plaintiffs had come to Court with false facts. The learned counsel also submitted that another factor, which should be borne in mind is that in his evidence as P.W.1, the plaintiff has stated that the plaintiff is bound to pay only a sum of Rs.54,000/- and that if for some reason this court come to the conclusion that the defendant claim that they are entitled to more is correct, then the plaintiff is willing to pay that amount also. The learned counsel would therefore submit that the plaintiff had gone so far, as to accept the defendant's case and showed his bonafide by offering the extra sum. According to him, the plaintiff had paid entire sale consideration in Ex.A.4 and Ex.A.5

7. The relief of specific performance is an equitable one and it is purely discretionary and therefore, it is incumbent upon the plaintiffs to come to court with true facts, without suppression of any materials and with bonafides on his part. Even if the plaintiffs had made out a case, it is still the discretion of the court whether to grant the relief of specific performance. In this case, the finding of the trial court is that the plaintiffs have given false details. In spite of that the court decides to give specific performance only on the ground that he has proved readiness and willingness, we will see whether the finding that the plaintiffs have come with a false case is correct.

8. Under Ex.A.1, what was received by the defendant was a sum of Rs.50,000/- as advance for the sale of two acres of land. The recitals relating to payment of advance would show that it was paid in the presence of the witnesses mentioned below. " அடியில் காணும் சாட்சிகள் முன்னிலையில்". Ex.A.3 endorsement shows that on 21.04.1986, the plaintiffs did not have sufficient funds and facility to conclude the sale transaction and therefore, time was granted. On 28.04.1986, two sale deeds were executed in respect of one acre of land. The recitals relating to payment of advance have already been extracted above.

9. The learned counsel for the respondent would submit that a sum of Rs.50,000/- was paid on 18.06.1985 in the presence of the witnesses mentioned therein, namely Venkatachalam, Vadugakonar and Ponnusamy, where as the sums of Rs.10,875/- and Rs.14,125/- were paid before the witnesses, who signed in Ex.A.4 and Ex.A.5, who are V.M.Ramasamy and A.Velliyangiri. Therefore, the recitals in the documents would themselves show that Rs.50,000/- was paid before three persons, who are other than the persons before whom these two sums were paid.

10. It is difficult to accept this. In Ex.A.7, which is the reply to the suit notice, the defendant had stated that out of the said sum of Rs.75,000/-, payable for Ex.A.4 and Ex.A.5, a sum of Rs.25,000/- was adjusted from the advance of Rs.50,000/- paid on 18.06.1985. Now the plaintiffs have to show that the advances of Rs.10,875/- under Ex.A.4 and Rs.14,125/- under Ex.A.5, were paid after 18.06.1985, but before 28.04.1986. The recitals in Ex.A.4 and Ex.A.5 merely use the word " ஏற்கனவே" which means earlier. If the plaintiffs' case was true, in the plaint they would have specified the dates on which these two sums were paid. The plaint is bereft of particulars and it merely states that the entire consideration for these has been paid without adjusting the advance. In his evidence, P.W.1 has said "Ex.A.4 and Ex.A.5க்கு எவ்வளவு பணம் கொடுத்தோம் என்று ஞாபகம் இல்லை Ex.A.4 and Ex.A.5 ல் முன்பணத்தை சரி கட்டிக் கொள்ளவில்லை ". He does not say on what date prior to 28.04.2006 (the date of Ex.A.4 and Ex.A.5). He does not remember how much was paid. It is unlikely that a person parting with more than Rs.10,000/- would have done so, without obtaining some kind of receipt. For this, the learned counsel for the respondent would submit that the parties are known to each other and trust each other and that in fact, D.W.1 had stated in his evidence that the plaintiffs are honest persons " வாதிகள் நாணயமானவர்கள்" and that therefore, it did not occur to the parties to obtain receipt. Even assuming that this was the case, the plaintiffs should have been alerted on receipt of Ex.A.7 and that was the occasion when they could have pleaded and placed beyond the pale of controversy the fact of payment of entire sale consideration for Ex.A.4 and Ex.A.5 without adjusting the advance of Rs.50,000/- paid under Ex.A.1. The plaintiffs do not do so in the pleading nor in their oral evidence. It would have been very easy for them to summon one of those witnesses in Ex.A.4 and Ex.A.5 to show that those two sums were paid before them on a date, prior to Ex.A.4 and Ex.A.5. Such a case was never pleaded by the respondent before the trial court. It is advanced for the first time at the appellate stage, for which there is no basis in the pleading. The mere recital, which are perhaps the usual recitals incorporated by scribes that " அடியில் காணும் சாட்சிகள் " cannot by themselves prove the payment of the said sums in the face of the categorical denial in Ex.A.7. In fact in Ex.A.7, the defendant does not evade his duty to execute the sale deed, all that the defendant says is that "you will pay the entire amount on or before 21.07.1986, the sale deed would be executed". The plaintiffs do not take advantage of this, but pressed their case of non-adjustment of advance, which they do not prove. In fact this non-adjustment of advance is difficult to believe. On the other hand, when the agreement was for purchase of two acres of land, it is natural that the purchasers would like to adjust 50% of the advance paid under the sale agreement, while purchasing one

acre, which is half of the extent of the lands agreed to be purchased under Ex.A.1. The fact that the figures mentioned as advance in Ex.A.4 and Ex.A.5, which are not round figures, but the aggregate of the sums mentioned, as paid as advance totals to RS.25,000/- also indicated this. It appears as if this Rs.25,000/- has been apportioned in the two sale deeds proportionately to the extent purchased under each of the sale deed. Of course, these are not facts which have been elicited in the evidence or stated in the written statement. But the probability of the defendant's case that Rs.25,000/- was adjusted by the plaintiffs in Ex.A.4 and Ex.A.5 sums is more likely. This appears more in confirmity with ordinary human conduct. The plaintiffs have not clearly proved the payment of this amount and therefore, the finding of the trial court that the plaintiffs come with false case of non-adjustment of advance of Rs.50,000/- in the sale deeds, Ex.A.4 and Ex.A.5 are confirmed.

11. In the decision, A.Ulaganatha Reddy vs. D.Nandagoppal Chetti (2005 (4) CTC 426), the learned Judge has cited several authorities and found that on a consideration of the conduct of the plaintiff, the refusal to grant the relief of specific performance was well founded.

12. In the decision, Aniglase Yohanna vs. Ramlatha, (2005 (5) CTC 800), the learned Judges have again dealt with many of the earlier cases, which declare how discretion should be exercised. The Supreme Court has held that a person seeking benefit of the specific performance of contract " must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposed a personal bar", referred the principle behind Section 16 (c) read with Explanation (ii).

16. Personal bars to relief : -

(a).....

(b).....

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation : For the purpose of clause (c) :-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court.

(ii) the plaintiff must aver performance of,

or readiness and willingness to perform, the contract accordingly to its true construction."

13. As regard readiness and willingness, it has been consistently held by our Court that the plaintiff has to prove his readiness and willingness right through out, until the date he files the suit for specific performance.

14. In this case, it is no doubt true that as per Ex.A.3, the time has been extended, but when the defendant had stated that Rs.54,000/- is not the amount to be paid, but Rs.1,08,000/- containing with Rs.25,000/- advance was adjusted and still the plaintiffs come to the Court, committing himself payment of Rs.54,000/- and once the court has found that the plaintiffs had in fact adjusted Rs.25,000/-, out of the advance paid in Ex.A.1 towards purchase of Ex.A.3 and Ex.A.4, would show that his readiness and willingness is not correct and that he is not ready and willing to pay the balance payment, of course in his evidence, he has stated that he is ready to pay what ever the defendant asks "jahuhf cs;nsd;". But having come to the court with false case and having offered to pay a sum less than bound to pay will not help him.

15. In 1999 (7) SCC 303 (Ramkumar Agarwal vs. Thawan Das), the Supreme Court held that the borrower who falsely claims to have paid the sum of money and attempts to prove the plea at the trial stage cannot be said to have been ever ready and willing to pay the sum due under the contract in question. This decision applies to the present case.

16. For having come to court with the false case, which has been rightly found against him by the trial court, the plaintiff has clearly disintitiled himself from getting a decree for specific performance. The Judgment and Decree of the court below is set aside. The appeal is allowed with costs.

Tsvn

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

The III Additional Sub Court
Coimbatore.

2. The Section Officer, VR Section, High Court
Madras

+ one cc to Mr. K. Shahul Hameed, Advocate sr no. 37687
+ one cc to Mr. T.M. Hariharan, Advocate sr no. 37627
+ one cc to Mr. S. Kolandasamy, Advocate sr no. 38478

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